In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 266

S. S. SILBERBLATT, INC., and THE STERLING COMPANY, PETITIONERS

v.

THE RENEGOTIATION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. This action was instituted in the Tax Court of the United States to review the Renegotiation Board's determination that petitioners had realized $1.9 million in excessive profits as a result of work on a Capehart Act military housing project.[1] Not challenging

[1] The Capehart military housing program was enacted in 1955 as an emergency measure, in order to provide approximately 234,000 military housing units in a period of three years. The urgent need for these housing units was caused

the Board's determination of the amount of excessive profits, petitioners claimed in the Tax Court that the Renegotiation Act (50 U.S.C. App. 1211, *et seq.*) did not apply to military housing construction under the Capehart Act (42 U.S.C. 1594-1594k; 12 U.S.C. 1748-1748i) and that, if it did apply, such application was unconstitutional. The Tax Court rejected both arguments (Pet. App. B, 8a-16a) and the court of appeals summarily affirmed (Pet. App. A, 1a-2a).

2. There is no warrant for further review. Petitioners have abandoned their coverage argument,[2] and now rely solely on their claim that Section 106 (a) (9) of the Renegotiation Act is unconstitutional because it exempts from renegotiation all competitively bid construction contracts, except those awarded under the Capehart Act (Pet. 9-16). Petitioners contend that this distinction is so arbitrary and unreasonable as to deny them due process and equal protection of the laws (Pet. 4).

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by the low re-enlistment rate among military personnel, which was attributed in great part to the absence of adequate housing for the families of enlisted men. See S. Rep. No. 404, 84th Cong., 1st Sess., p. 10, and Hearings before a Subcommittee of the Senate Committee on Banking and Currency, Housing Act of 1955, 84th Cong., 1st Sess., v. 3, pp. 36-37, 477-478, 480. The Capehart Act declares that additional military housing is needed "[i]n order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations * * *." 12 U.S.C.

[2] In their contract with the Air Force, petitioners expressly agreed to renegotiation (Pet. 8-9).

The Renegotiation Act, Sections 102(a) and 103 (a), covers practically all defense contracts. The elimination of some competitively bid construction contracts by Section 106(a)(9)—non-construction competitively bid contracts remain subject to renegotiation—reflects a judgment by Congress that in certain areas competitive conditions are such that renegotiation is not necessary. There is nothing impermissible in subjecting to renegotiation only those government contracts that Congress has not satisfied itself are subject to truly competitive conditions.[3] Congress does not have to act with complete uniformity in the field of regulatory legislation. *Wickard* v. *Filburn*, 317 U.S. 111, 129-130; *Currin* v. *Wallace*, 306 U.S. 1, 14; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 151. Only when federal legislation makes discriminations "so unjustifiable as to be violative of due process," *Bolling* v. *Sharpe*, 347 U.S. 497, 499, *Shapiro* v. *Thompson*, 394 U.S. 618, 642, is it constitutionally invalid, there being no equal protection clause in the Fifth Amendment. The legislative history and the terms of the Renegotiation Act show that the classification established by Section 106 (a)(9) was carefully considered by Congress and is not arbitrary or unreasonable.

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[3] The Senate committee hearings reveal that Congress specifically indicated its concern respecting the possibility of windfall profits resulting from overpriced Capehart Act military housing contracts. See Hearings before a Subcommittee of the Senate Committee on Banking and Currency, Housing Act of 1955, 84th Cong., 1st. Sess., v. 3, pp. 52-53, 328-329, 417-418.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

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